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No. 83-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HOSPITAL DE LA CONCEPCION,
Petitioner,

v.

PUERTO RICO LABOR RELATIONS BOARD,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE COURT:

Now comes the Puerto Rico Labor Relations Board, hereinafter called "the Local Board," through its undersigned attorney and respectfully prays that the Writ of Certiorari requested by Hospital la Concepcion, hereinafter called "the Hospital," to review the opinion and order of the Supreme Court of the Commonwealth of Puerto Rico rendered in this case, be denied.

OPINIONS BELOW AND STATEMENT OF THE CASE

The references made by the Hospital to the opinions below and to the facts are adopted by the Local Board. Notwithstanding clarification of some of the facts will be made during the argument.

REASONS FOR DENYING THE WRIT

1. *The Doctrine Of Federal Preemption Is Not Applicable To The Specific Circumstances Of The Instant Case.*

In the case of *Jones* v. *Rath Packing Co.* 430 U.S. 519, 525-526 (1977) this Honorable Court provided an explicit guidance to be followed in cases where the doctrine of preemption is raised.[1] This court has ruled that in cases of that nature the court has to determine whether or not the Congress pursuant to its power to regulate commerce, has clear and manifestly prohibited state regulation of the particular aspect of commerce involved in a case, or second, whether under the circumstances of the particular case the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[2]

None of those two factors are present in the case at bar.

Since 1947 and until August 25, 1974 the Congress specifically excluded the hospitals from the coverage of the National Labor Relations Act, hereinafter called the "Federal Act."

Thus, until August 25, 1974 the hospitals were not employers subject to the Federal Act and their employ-

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[1] "The constitutional principles of pre-emption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter . . ." *Motor Coach Employees* v. *Lockridge*, 403 US 274, 285-286 (1971). See also *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

[2] See also *City of Burbank* v. *Lockeed Air Terminal, Inc.* 411 U.S. 624, 633 (1973) quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *De Canas* v. *Bica*, 424 U.S. 351 (1976); *Kelly* v. *Washington* 302 U.S. 1 (1937).

ees were not employees under that Act.[3] Therefore, no enforcement of the provisions of the Federal Act could be made over them with regard to events occurred prior to that date.

Besides that, the Congress had not prohibited the enactment of legislation by the States to regulate that aspect of commerce. Consequently this aspect was left to the States because no conflict could be created between the local legislation and the federal legislation since no enforcement of the Federal Act could be made by the Federal Board[4] over the hospitals labor management relations corresponding to that period.

As it has been reiterately ruled by this Honorable Court since many years ago as to the relations between the Federal and States' powers:

> "Under our constitutional system there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases (Simpson* v. *Shepard)* 230 U.S. 352, 402, 57 L.

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[3] To be subject to the provisions of Sections 7 and 8 of the Federal Act, 29 USC 157 an 1958, that refer to "employers" and "employees," it is necessary to be "employers" and "employees" under 29 USC Section 152(2) and (3) respectively. Due to the fact that until August 25, 1974 the hospitals were not employers under 29 USC 152(2) and their employees were not employees under 29 USC 152(3) they were not subject to 29 USC 157 and 158. See *Hospital Employees Labor Program, Chicago* v. *Ridgeway Hospital*, 570 F.2d 167, 169-70 (1978).

[4] In the circumstances of this case there is not even a peripheral concern of the Federal Act because for the time concerned in this case, 1973, the Hospital activities were simply out of the provisions of the Federal Act. See *Machinists* v. *Gonazlez*, 356 U.S. 617 (1958).

> ed 1511, 1542, 33 S. Ct. 729, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18. States are thus enable to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. *There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced.* The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' " (citations omitted). *Kelly* v. *Washington*, 302 US 1, 9-10 (1937). (Emphasis added).

The trend of this Honorable Court is that of requesting a strong showing of conflict between federal and local laws before finding federal preemption. *Goldstein* v. *California*, 412 U.S. 546 (1973); *New York State Department of Social Services* v. *Dublino*, 413 US 405 (1973); *Merrill Lynch Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117 (1973); *Kewanee Oil Co.* v. *Bicron Corp.*, 416 US 117 (1974); *Silver* v. *New York Stock Exchange*, 373 US 341 (1963).

This Honorable Court has also stated that the National Labor Management Relations Act leaves much to the States. *Garner* v. *Teamsters Union*, 346 U.S. 485, 488 (1953) and cases cited at footnote 4.

More than thirty years ago the Commonwealth of Puerto Rico approved its own Labor Relations Act,[5] creating

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[5] 29 L.P.R.A. Sections 61 et seq.

its own Labor Relations Board,[6] hereinafter called the "Local Board." It was created as a specially constituted administrative tribunal and the Legislature prescribed a particular procedure for filing of charges, investigation, complaint and notice, hearing and decision, and judicial review.[7]

It has been ruled by the Supreme Court of Puerto Rico that the Local Board has jurisdiction over employers' business and employees exempted from the Federal Act or over activities not covered by the Federal Act.[8]

On January 9, 1974 a labor organization called Federacion de Enfermeras Practicas Licenciadas de Puerto Rico, hereinafter called "the Union," filed before the Local Board an unfair labor practices charge against the Hospital. The Local Board asserted jurisdiction in the case under the provisions of 29 L.P.R.A. § 70 and initiated an investigation of the charge, which obviously referred to practices that occurred prior to the date of the filing of the charge.

Having the Local Board asserted jurisdiction in the case and while it was investigating the alleged unfair labor practices, the Federal Act was amended to bring the health care institutions under the jurisdiction of the Federal Board.

Since the alleged unfair labor practices were previous to the inclusion of the Hospital under the Federal Act, the

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[6] 29 L.P.R.A. Section 64.

[7] 29 L.P.R.A. Section 70.

[8] *Puerto Rico Telephone Co.* v. *Labor Relations Board*, 86 P.R.R. 362 (1962); *Labor Relations Board* v. *Milares Realty, Inc.* 90 P.R.R. 821 (1964); *Labor Relations Board* v. *Club Deportivo*, 84 P.R.R. 495, 501 (1962).

Local Board continued the ongoing proceedings in the case, and after the completion of the investigation it ordered the filing of a complaint against the Hospital on March 3, 1975.[9] After the corresponding due proceedings, on which the parties fully participated, the Local Board found that in 1973 the Hospital had engaged in the following unfair labor practices:

1. That on August 1, 1973 it failed to bargain with the Union, which was the exclusive representative of the nurses for bargaining purposes. (Art. 8(1)(d) of the Local Act, 29 LPRA, sec. 69(1)(c).

2. That on October 1, 1973 it incurred in the unfair practice of dismissal by discrimination when it dismissed five of its employees a while after they participated in said activity. (Art. 8(1)(c) of the Local Act, *supra*).

3. That it committed the unfair labor practice of changing the working conditions of three of its employees. (Art. 8(1)(c) of the Local Act, *supra*).

With regard to those conclusions the Local Board ordered as follows:

1. As to the unfair practice of failing to bargain, the Local Board stated.

> "Considering the fact that since August 25, 1974, the National Labor Relations Board assumed jurisdiction over nonprofit hospitals that

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[9] The jurisdiction of the Board, begins with the filing of a charge of an unfair labor practice before it. *L.R.B.* v. *McConnie*, 94 P.R.R. 450 (1967); *National Labor Relations Board* v. *Swift and Company*, 233 F 2d 226 (1956); *Consumers Power Co.* v. *National Labor Relations Bd.* 113 F 2d 38 (1940); *Comunidad Agricola Bianchi* v. *Labor Relations Board*, 92 P.R.R. 665, 668 (1965); *Labor Relations Board* v. *Linea Suprema, Inc.*, 89 P.R.R. 821, 826 (1964). In *Comunidad Agricola Bianchi* v. *Labor Relations Board*, supra, it was pointed

comply with the jurisdictional rules of said Board, we deem that a conflict between the National and the local jurisdictions could ensue if we ordered defendant an affirmative action to remedy the unfair practice of refusing to bargain. Hence, we do not order affirmative action on this particular" (See Appendix to the Petition in this case, pages 24a-25a.

2. As to the unfair labor practices of dismissal of employees by discrimination, and changing of working conditions because of their participation in an union and/or concerted activity, the Local Board ordered the Hospital: To cease and desist from that practices, to reinstate the dismissed employees with back pay, and to restore to their old positions or to offer a similar position to the one they occupied, to the employees whose working conditions had been changed by the Hospital. (See App. to Petition, p. 24a-25a)

Although the Local Board asserted jurisdiction in this case on January 4, 1974 relating exclusively to facts that took place before that date, and notwithstanding the fact that the Local Board avoided on its Order the most minimal conflict that could exist between the Federal Act and the Local Act, the Hospital contends that the local Board was precluded from asserting jurisdiction under the circumstances of the case.

The argument pressed by the Hospital is that on August 25, 1974 the Congress had retroactively occupied the field and that no room was left for the Local Board action in relation to previous labor matters affecting employers' business and its employees, even though they were ex-

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out that: ". . . If legal jurisdiction has been acquired the *Board exercises it fully*, including the affirmative actions which it must issue as a result of its decisions." 92 P.R.R. at 668. Emphasis added.

empted from the coverage of the Federal Act until August 25, 1974.

The Local Board respectfully disagree with the argument pressed by the Hospital.

It is a general rule that "amendatory statutes generally operates prospectively only a strong indication of legislative intent to the contrary." *In re Reilly*, 442 F 2d 26, 28, *Cert. denied* 404 US 854 (1971); *Hospital Employees Labor Program, Chicago* v. *Ridgeway Hospital*, 570 F 2d 167 (1978).

It has also been held by different courts and specifically by the Federal Board that it does not have jurisdiction over an unfair labor practices charge involving facts occurring before the effective date of an act or amendatory act of the Congress except when it strong and clearly indicates its intent to the contrary. *United States Postal Service*, 200 N.L.R.B. 413 (1972); *Hospital Employees Labor Program, Chicago* v. *Ridgeway Hospital*,[10] *supra*, *N.L.R.B.* v. *St. Luke's Hospital Center*, 551 F 2d 476 (1976); *Puerto Rico Labor Relations Board and Sociedad Espanola de Auxilio Mutuo*, 217 N.L.R.B. No. 168,89 L.R.R.M. 1164 (1975); *Vancouver Memorial Hospital*, 219 N.L.R.B. No. 15, 89 L.R.R.M.1592 (1975) *Methodist Hospital of Ky. Inc.* v. *N.L.R.B.*, 619 F.2d 563, 568-571 (6th Cir. 1980); *Woodlawn Hospital* v. *N.L.R.B.*, 596 F. 2d 1330, 1337 (7th Cir. 1979); *Pa. Ass'n of Int. & Res.* v. *Albert Einstein Med. Ctr.*, 369 A. 2d 711, 713 (Pa. 1976).

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[10] In the above referred case it was pointed out by the Court:

". . . *We do not believe Congress intended the amendment to change the legal effect of a past event by converting a duty arising from the event under state law into a duty arising under federal law.*" 570 F 2d at 170.

Mile Square Health Center, 223 N.L.R.B. No. 201,92 L.R.R.M. 1095 (1976); *Beverly Farm Foundation*, 225 N.L.R.B. No. 70, 92 L.R.R.M. 1425 (1976).

According to the contention of the Hospital, at the effective date of the health care amendments to the Federal Act all the ongoing proceedings before the Local Board, involving charges against hospitals, were automatically stopped and all the liabilities of the hospitals under the Local Act were extinguished because the Local Board was allegedly left without jurisdiction over those cases, even though only past events were involved in such charges.[11]

The Hospital assumes that position notwithstanding the fact that Congress did not intend to give retroactive effect to the health care amendments to empower the Federal Board to assert jurisdiction over events that took place before August 25, 1974. The Federal Board lacks jurisdiction in this case because there does not exist a Federal Act to be enforced by it as to events occurred before August 25, 1974. Thus, the assertion of jurisdiction in this case by the Local Board, the only forum with jurisdiction in the subject matter, does not create any conflict with the Federal Act or the Federal Board. Under the aforementioned circumstances the Local Act and the jurisdiction asserted by the Local Board do not stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress, aimed to the prospective application of the health care amendment. Therefore, the Local Board correctly asserted jurisdiction in the instant case to consider facts that took effect prior to the effective date of that amendment.

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[11] As to this aspect see *National Labor Relations Board* v. *National Garment, Co.*, 166 F. 2d 233 (1948).

2. *The Decision In The Instant Case Does Not Conflict With Any Of This Court's Decisions*

The Hospital avers that the assertion of jurisdiction by the Local Board in this case is in conflict with the following decisions of this Court. *Bethlehem Steel Corp.* v. *New York Labor Board*, 330 U.S. 767 (1947); *Garner* v. *Teamsters Chauffers and Helpers*, 346 U.S. 485 (1953); *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1 (1957); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) *supra*, *and Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971).

The Hospital also sustains that it is contrary to the holding of the Court of Appeals for the Second Circuit in *N.L.R.B.* v. *St. Luke Hospital Center*, 551 F. 2d 476 (1976) and in *NLRB* v. *Committee of Interns*, 566 F. 2d 810 (1977) *cert. denied* 435 U.S. 904 (1978).

The Local Board respectfully disagree with those averments.

The decision in the instant case is not in conflict with those decisions because the particular circumstances of this case were not considered in any those cases.

In the case of *Bethlehem Co.* v. *State Board*, *supra*, the Federal Act and the State Act were regulating the same subject matter at the same time and jurisdiction over the same subject matter was given by the respective act to the Federal Board and to the State Board.

For that reason this Honorable Court pointed out in that case:

> "Comparison of the State and Federal statutes will show that both government have laid hold of the same relationship for regulation, *and it involves the same employees*. Each has delegated to an administrative authority a wide discretion in applying this

> plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, to administrative bodies are asserting a discretionary control *over the same subject matter*, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. . . . *If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other.* The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. . . . *The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general.* It asserts, and rightfully so, under our decision in the *Packard* case, *supra*, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted." 330 U.S. at pages 775-776. Emphasis added.

That is not the situation of this case because the jurisdiction given to the Federal Board by Congress effective on August 25, 1974, is prospective and, the assertion of jurisdiction by the Local Board relates only to facts occurred before that date. Thus no conflict is possible.

In the case of *Garner* v. *Teamsters Union*, *supra*, a subject matter on which the Federal Board had jurisdiction was brought in the first instance before a State Court.

In the case of *Guss* v. *Utah Labor Board*, *supra*, the Federal Board had express jurisdiction over the subject matter for the time pertinent in the case, but it declined to

assert jurisdiction over the charges filed before it. Since the Federal Board clearly had jurisdiction over the subject matter, this Honorable Court decided that the Utah Labor Board did not have jurisdiction.

In the case of *San Diego Building Trades Council* v. *Garmon, supra*, the conduct involved was plainly within the provisions of the Federal Act at the applicable time and this Honorable Court concluded that the Federal Board had the jurisdiction to make determinations as to that conduct in the first instance.

In the case of *Motor Coach Employees* v. *Lockridge, supra*, an action was brought before a State Court related to an alleged unfair labor practice that was at the applicable time within the exclusive primary jurisdiction of the Federal Board.

In the case of *NLRB* v. *St. Luke's Hospital Center, supra*, the court stated that the conduct complained of commenced in October, 1974, well after the effective date of the health care amendments and it did not present a true problem of retroactivity.

In the case of *NLRB* v. *Committee of Interns, supra*, the election petitions filed before the Federal Board and the State Board were presented after the effective date of the health care amendments. Thus, the subject matter was at that time under the jurisdiction of the Federal Board.

As it can be noted the abovementioned cases are inapposite to the present case because they do not present the specific and clear circumstances of the present case. Namely, that on August 25, 1974 the case was pending at the Local Board, that all the facts complained of before the Local Board occurred prior to that date; that until that date the Hospital, petitioner herein, and its employ-

ees were exempted from the provisions of the Federal Act and, the Federal Board did not have jurisdiction over its activities. Its activities during that period were under the exclusive jurisdiction of the Local Act and the Local Board.

As it was pointed out in *Woodlawn Hospital* v. *NLRB*, *supra*, at page 1333:

> "*There is no question that Woodlawn did not become an 'employer' subject to the National Labor Relations Act and the Board's jurisdiction until August 25, 1974* the effective date of the 1974 Health Care Amendments to the Act. Public Law 93-360. *Therefore the Board disclaims reliance on any actions of the hospital prior to August 25, 1974 to support its finding of a violation. In an attempt to avoid retroactive application of the statute, the Board relies solely on the Hospital's post-effective date refusal to grant reinstatement rights to the strikers as the basis of the unfair labor practice.*" Emphasis added.

In that same case it was stated by the Court at page 1336:

> "It is clear that Woodlawn employees, by striking prior to the effective date of the Health Care Amendments, engaged in conduct which Congress has declined to protect. Although the Labor [Federal] Board construed the original Wagner Act to include nonprofit hospitals, *in 1947 Congress specifically excluded health care institutions from the coverage of the act. . . .*" Emphasis added.

From 1947 to August 25, 1974 the hospitals were in the same situation of those employers dedicated to agricultural activities. As to this point it was stated in the case of *N.L.R.B.* v. *Committee of Interns & Residents, supra:*

> ". . . Thus, the exclusion of agricultural workers in § 2(3), 29 U.S.C. § 152(3), is the result of Con-

> gressional decision not to exercise federal power over farm labor. See 79 *Cong. Rec.* 972 (1935); 93 Cong. Rec. 6599 (1947). Therefore, *the states may assert jurisdiction over the labor relations of farms and their employees.* See *United Farm Workers Organizing Comm.* v. *Superior Court*, 4 Cal. 3d 556, 94 Cal. Rptr. 2d 263, 483 P.2d 1215 (1971) (In banc) . . ." 566 F. 2d 815, footnote 5. Emphasis added.

For all the above mentioned reasons it is necessary to conclude that the instant case only presents a matter of local law. And it has been held repeatedly that the Supreme Court of Puerto Rico should not be reversed in a matter of local law unless the court's determination is "inescapably wrong" or "patently erroneous." *Sancho Bonet* v. *Texas Co.*, 308 U.S. 463 (1940); *De Castro* v. *Board of Commissioners*, 322 U.S. 451 (1944); *C. Brewer P.R.* v. *Corchado*, 303 F 2d 645 (1962); *Acosta Marrero* v. *Commonwealth of Puerto Rico*, 275 F 2d 294 (1960); *Fullana Corp.* v. *P.R. Planning Board*, 257 F 2d 355 (1958); *Marquez* v. *Aviles*, 252 F 2d 715 (1958); *Iglesias Acosta* v. *Secretary of Finance of Puerto Rico*, 220 F 2d 651 (1955); *Sagastivelza* v. *P.R. Ins.*, 171 F 2d 563 (1949) *Compose* v. *Central Cambalache, Inc.*, 157 F 2d 43 (1946); *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41 (1970).

CONCLUSION

Inasmuch as the Local Board correctly asserted jurisdiction in this case, as it does not involve a federal question and, since the determination of the Supreme

Court of Puerto Rico is not inescapably wrong or patently erroneous, the writ of certiorari should be denied.

Respectfully submitted

In San Juan, Puerto Rico, this 16th day of January, 1984.

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